No. 14-12373

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

PETER E. CLAY,

Defendant-Appellant,

AND

TODD S. FARHA, PAUL L. BEHRENS, AND WILLIAM L. KALE,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida, No. 8:11-cr-00115-JSM-MAP
Before the Honorable James S. Moody, Jr.

REPLY BRIEF FOR DEFENDANT-APPELLANT PETER E. CLAY

WILLIAM F. JUNG
PAUL M. SISCO
JUNG & SISCO, P.A.
101 E. Kennedy Blvd., Suite 3920
Tampa, FL 33602
(813) 225-1988

LAWRENCE S. ROBBINS
MARK T. STANCIL
DONALD BURKE
DANIEL N. LERMAN
ROBBINS, RUSSELL, ENGLERT, ORSECK,
UNTEREINER & SAUBER LLP
1801 K Street NW, Suite 411-L
Washington, DC 20006
(202) 775-4500
lrobbins@robbinsrussell.com

April 17, 2015

AMENDED CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, the undersigned hereby certifies that the persons and entities listed below have an interest in the outcome of this case. Other than WellCare Health Plans, Inc. ("WellCare"), none of the entities listed below is publicly traded. WellCare is a publicly traded company, and its stock ticker is WCG. There is no parent corporation or publicly held corporation that owns 10% or more of its stock.

Adams, Natalie H., Counsel for United States of America

America's 1st Choice California Holdings, LLC, Indirect wholly-owned subsidiary of WellCare

Behrens, Paul L., Defendant-Appellant

Bentley, Arthur Lee, III, Counsel for United States of America

Bereday, Thaddeus, Defendant

Berman, Douglas A., Amicus Curiae

Berman, Nathan M., Counsel for Thaddeus Bereday

Boss, Barrett L., Counsel for Todd S. Farha

Bowers, John J., Counsel for United States of America

Burke, Donald, Counsel for Peter E. Clay

Califano, Michael G., Counsel for Paul L. Behrens

Carroll, Catherine M.A., Counsel for Todd S. Farha

Clay, Peter E., Defendant-Appellant

Cleary, Lauri E., Counsel for William L. Kale

Comprehensive Health Management, Inc., Indirect wholly-owned subsidiary of WellCare

Comprehensive Reinsurance, Ltd., Indirect wholly-owned subsidiary of WellCare

Cooper, Todd J., Counsel for Paul L. Behrens

Daniel, Stephanie A., Counsel for Florida Agency for Health Care Administration

Donahue, Patrick M., Counsel for William L. Kale

Easy Choice Health Plan, Inc., Indirect wholly-owned subsidiary of WellCare

Exactus Pharmacy Solutions, Inc., Indirect wholly-owned subsidiary of WellCare

Farha, Todd S., Defendant-Appellant

Fernandez, Jr., Jack E., Counsel for Thaddeus Bereday

Fisher, Jeffrey L., Amicus Curiae

Florida Agency for Health Care Administration, Victim

Fugate, Lee, Counsel for Thaddeus Bereday

Garinther, Geoffrey R., Counsel for WellCare Health Plans, Inc.

George, Peter E., Counsel for Todd S. Farha

Green, Bruce, Amicus Curiae

Harmony Behavioral Health IPA, Inc., Indirect wholly-owned subsidiary of WellCare

Harmony Behavioral Health, Inc., Indirect wholly-owned subsidiary of WellCare

Harmony Health Management, Inc., Indirect wholly-owned subsidiary of WellCare

Harmony Health Plan of Illinois, Inc., Indirect wholly-owned subsidiary of WellCare

Harmony Health Systems, Inc., Indirect wholly-owned subsidiary of WellCare

Hasbun, Marcos E., Counsel for Thaddeus Bereday

Hoppmann, Karin B., Counsel for United States of America

Jung, William F., Counsel for Peter E. Clay

Kale, William L., Defendant-Appellant

Kehoe, Gregory W., Counsel for WellCare Health Plans, Inc.

Kian, Sina, Counsel for Todd S. Farha

Krigsman, Cherie L., Counsel for United States of America

Lamken, Jeffrey A., Counsel for Paul L. Behrens

Lerman, Daniel N., Counsel for Peter E. Clay

Lauro, John F., Counsel for Paul L. Behrens

Matthews, Michael P., Counsel for Paul L. Behrens

McCullough, J. Bradford, Counsel for William L. Kale

Michelich, John A., Counsel for United States of America

Miller, Gregory R., Amicus Curiae and Counsel for Amici Curiae Professors and Practitioners

Missouri Care, Incorporated, Indirect wholly-owned subsidiary of Well Care

Moody Jr., James S., United States District Court Judge

Moylan, Daniel P., Counsel for WellCare Health Plans, Inc.

Nathans, Larry Allen, Counsel for William L. Kale

Neiman, Peter G., Counsel for Todd S. Farha

'Ohana Health Plan, Inc., Indirect wholly-owned subsidiary of WellCare

Olympic Health Management Services, Inc., Indirect wholly-owned subsidiary of WellCare

Olympic Health Management Systems, Inc., Indirect wholly-owned subsidiary of Well Care

O'Neill, Robert E., former United States Attorney

Pattillo Jr., Michael G., Counsel for Paul L. Behrens

Pizzo, Mark A., United States Magistrate Judge

Raleigh, Lisa M., Counsel for Florida Agency for Health Care Administration

Reed, Stanley J., Counsel for William L. Kale

Rhodes, David P., Assistant United States Attorney, Chief, Appellate Division

Robbins, Lawrence S., Counsel for Peter E. Clay

Saltzburg, Stephen A., Amicus Curiae

Schoenfeld, Alan E., Counsel for Todd S. Farha

Sisco, Paul M., Counsel for Peter E. Clay

Sonnett, Neal R., Amicus Curiae

Stancil, Mark T., Counsel for Peter E. Clay

Sterling Life Insurance Company, Indirect wholly-owned subsidiary of WellCare

Stith, Kate, Amicus Curiae

The WellCare Community Foundation, Indirect wholly-owned subsidiary of WellCare

The WellCare Management Group, Inc., Indirect wholly-owned subsidiary of WellCare

Titus, Jr., Douglas J., Counsel for Todd S. Farha

Totaro, Martin V., Counsel for Paul L. Behrens

Trezevant, Jay G., Counsel for United States of America

United States of America, Plaintiff-Appellee

Valiente, Lauren L., Counsel for Paul L. Behrens

Vaughan, Laura L., Counsel for Todd S. Farha

Walker, Lucas M., Counsel for Paul L. Behrens

Waxman, Seth P., Counsel for Todd S. Farha

WCG Health Management, Inc., Direct wholly-owned subsidiary of WellCare

Weinberg, Jr., Morris, Counsel for Thaddeus Bereday

WellCare Health Insurance Company of Kentucky, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare Health Insurance of Arizona, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare Health Insurance of New York, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare Health Plans, Inc., (NYSE ticker symbol: WCG), Petitioner and Movant below

Well Care Health Plans of California, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare Health Plans of New Jersey, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare Health Plans of Tennessee, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare of Connecticut, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare of Florida, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare of Georgia, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare of Kansas, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare of Louisiana, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare of Nevada, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare of New York, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare of Ohio, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare of South Carolina, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare of Texas, Inc., Indirect wholly-owned subsidiary of WellCare

WellCare Pharmacy Benefits Management, Inc., Indirect wholly-owned subsidiary of Well Care

WellCare Prescription Insurance, Inc., Indirect wholly-owned subsidiary of WellCare

Windsor Health Group, Inc., Indirect wholly-owned subsidiary of WellCare

Windsor Health Plan, Inc., Indirect wholly-owned subsidiary of WellCare

Windsor Management Services, Inc., Indirect wholly-owned subsidiary of WellCare

Winik, Daniel, Counsel for Todd S. Farha[*]

Wisotsky, Steven, Amicus Curiae

/s/ Lawrence S. Robbins
LAWRENCE S. ROBBINS
April 17, 2015

[*] A party listed for the first time on this Amended Certificate of Interested Persons and Corporate Disclosure Statement is italicized.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

STATEMENT REGARDING ADOPTION OF BRIEFS

Peter Clay adopts the following portions of other briefs filed in this case:

- Brief for Defendant-Appellant Paul L. Behrens
  - "Defendants' Convictions Should Be Reversed Under *Whiteside*" (pp. 4-30)
  - "The Government's Use Of WellCare's Financial Restatement Constitutes Prejudicial Error" (pp. 30-44)
  - "The Willful Blindness Instruction Was Error" (p. 47)
- Brief for Defendant-Appellant Todd S. Farha
  - "The Admission And Use Of Wealth Evidence Was Reversible Error" (pp. 26-30)

PRELIMINARY STATEMENT

Most of the government's brief has nothing to do with Peter Clay's appeal. That's no surprise: Clay joined WellCare long after the 80/20 reporting methodology was developed, and worked on only two submissions at issue—the 80/20 submission for CY2005 (which underlies Count 10), and the February 2007 "encounter data" submission (which underlies Count 11). And although Clay was charged in the full panoply of health-care fraud and health-care false statements counts, he was convicted on none of them. Rather, he was convicted only on two Section 1001 false statements arising during an informal interview with agents the day WellCare was searched.

What little space the government devotes to Clay's arguments falls short of the mark. The government's contention that Clay's statements were objectively false rests not only on a misreading of *United States v. Whiteside*, 285 F.3d 1345 (11th Cir. 2002), as Behrens's Reply shows, but also on a wholesale mischaracterization of Clay's answers. The government says nothing whatsoever about the objective truth of the statement at issue in Count 11. And its contention that Clay waived his objection to the instruction on Count 11 overlooks the portion of the record where Clay's counsel made *precisely* the objection now raised on appeal. See A664 (108:16-23).

When the government's brief isn't proving too little, it is proving too much. The government concedes (at 104 & n.31) that, to prove willfulness, it was required to show that Clay knew it was illegal to speak falsely to agents during an informal interview. Bereft of evidence, the government insists that, because Clay was "an executive operating a company dependent on public funds" (Gov't Br. 106), he *must* have had the requisite knowledge. So, too, with the government's materiality response: Bereft of evidence, the government insists that, because "more than 200 law enforcement personnel were involved in the search of WellCare" (Gov't Br. 108), Clay's answers *must* have "potentially distracted and derailed the investigation" (Gov't Br. 109)—even though, as the government acknowledges (at 108-09), he disclosed the very facts the government would later claim as the centerpiece of the alleged fraud. If credited, the government's arguments would effectively read the willfulness and materiality elements out of Section 1001.

The district court recognized Clay's peripheral role in this case when it imposed a probationary sentence. Counts 10 and 11 should now be dismissed, or at a minimum a new trial granted.

ARGUMENT

I. THE GOVERNMENT FAILED TO PROVE FALSITY

As we explained in our opening brief (at 20-29), the government had to prove that Clay's statements were false under any reasonable understanding of the governing legal requirements. It failed to do so as to either Count 10 or Count 11.

A. The government first tries to duck the question of falsity altogether. In the government's view, the relevant questions "were the *agents'* questions during the interview, not the 80/20 templates' directions." Gov't Br. 92 (emphasis added). Accordingly, the government reasons, the truth or falsity of Clay's answers did not turn on whether the CY2005 80/20 submissions were "over-reported" within the meaning of the 80/20 Template, or whether the February 2007 encounter data were "inflated" within the meaning of the Encounter Template.

No one disputes that Counts 10 and 11 rested on "the agents' questions during the interview." Gov't Br. 92. But when the agents asked Clay whether the Plans "had over-reported [their] outpatient behavioral health costs," A752 (61:3-5), that question necessarily *incorporated by reference* the documents that *defined* whether those costs were "over-reported"—the 80/20 statute, the Contracts, and the 80/20 Templates. And when the agents asked Clay whether the Plans "had purposely inflated the costs of their behavioral health encounter submissions," A752 (61:24-62:1), that question *incorporated by reference* the document that

defined how to price encounter data—the Encounter Template. Thus, only by proving that the CY2005 80/20 costs were "over-reported" within the meaning of the 80/20 Template (Count 10) or the February 2007 encounter data were "inflated" within the meaning of the Encounter Template (Count 11) could the government prevail.

Take an analogous case: Suppose an agent asks a taxpayer whether he "incorrectly reported his adjusted gross income" on his tax return. The truth of the taxpayer's answer to that question—just like the truth of the tax return itself—turns on the rules governing the calculation of adjusted gross income. Similarly, if an agent asks a government contractor whether invoices he submitted "included unallowable expenses," the truth of his answer to that question depends on whether the contract in fact disallowed the expenses claimed; the term "unallowable expense" has no meaning outside the context of the contract.

So too here. The truth of Clay's statement that the Plans did not "over-report" outpatient behavioral health expenditures in its 80/20 submissions turns on whether those expenditures were over-reported *under the legal requirements governing 80/20 submissions.* And whether Clay truthfully stated that the Plans' behavioral health encounter submissions were not "inflated" depends on whether the encounters were inflated *under the rules governing encounter data*

submissions. The government cannot evade the requirement that it show falsity on the ground that Clay's statements were made to *agents*, and not on a form.

So the government takes another tack. As the government summarizes the testimony, Clay supposedly told the agents that he had no "belief of overreporting and inflation when he clearly did." Gov't Br. 93. The government contends that, if the prosecutors could prove that Clay *believed* that WellCare had "over-reported" its costs and "inflated" its encounter data—*even if, as an objective matter, WellCare did not actually do so*—Clay would be guilty of false statements under Section 1001.

That is an utter canard. Here is the agents' testimony as to what Clay actually said:

> Q Did you ask the defendant, Peter Clay, if HealthEase and Staywell had over-reported its outpatient behavioral health costs to AHCA over the years in order to avoid paying money back to AHCA?
>
> A Yes.
>
> Q And what was Mr. Clay's response to that question?
>
> A He responded to his knowledge they have not over reported the expenses.
>
> * * *
>
> Q Agent Johnston, did you ask Peter Clay whether HealthEase and Staywell had purposely inflated the costs of their behavioral health encounter submissions, the encounter submissions to AHCA?
>
> A Yes.
>
> Q What did he respond to that question?
>
> A Not to his knowledge.

A752 (61:3-62:4).

We recount those passages (the bases of Counts 10 and 11, respectively) because the government's argument rests on a fundamental mischaracterization of Clay's answers. Clay did not, as the government now suggests, say anything about whether he personally *believed* that the Plans' submissions violated the applicable law. Rather, when asked whether there was over-reporting or inflation, he said that, "to his knowledge," there was none. To prove those answers false, the government had to show not only that Clay *believed* the truth to be otherwise, but also that the truth *was* otherwise—that the costs were, in fact, "over-reported," and the encounter data were, in fact, "inflated."

Section 1001, like most criminal statutes, requires both a criminal *actus reus* (actual falsity) and a culpable *mens rea* (knowledge and willfulness):

> [E]ven where the evidence is sufficient to show the necessary *mens rea*, the government still must always "meet its burden of proving the *actus reus* of the offense." *United States v. Whiteside*, 285 F.3d 1345, 1353 (11th Cir. 2002). For instance, if a defendant mistakenly *thinks* that the barrel of his unregistered shotgun is shorter than eighteen inches when in fact it is longer than that length, he is innocent of the crime of possessing an unregistered firearm, even though he had the requisite guilty mind.

United States v. Zhen Zhou Wu, 711 F.3d 1, 18 (1st Cir. 2013) (emphasis added). Likewise, if he tells government investigators that he does not possess such an illegal weapon, the government cannot prosecute him for a false statement unless the barrel is, in fact, less than 18 inches. That is true even if the defendant

mistakenly *believes* that the barrel is too short and subjectively intends to mislead investigators. Actual truth is a complete defense to a false statement charge.

That principle applies here: To show that Clay's statements were false, the government has to show *both* that (1) there was, in fact, over-reporting and inflation under any reasonable interpretation of the applicable law, and (2) Clay believed there was over-reporting and inflation.

The government cannot avoid proving the *actus reus* merely because Clay used the qualifier "to my knowledge." *Any* statement of fact contains an implied assertion that it is true only so far as the speaker knows. The "to my knowledge" qualifier is an acknowledgment that there might be facts, unknown to the speaker, that would render his statement false. But the statement "no, not to my knowledge" is still a statement of objective truth—and can be proven false only by proving that the underlying assertion (in this case, that there was no over-reporting or inflation) is objectively false.

The government's theory also yields absurd consequences. According to the government, if Clay had responded to the question whether the encounter-data submissions were inflated with a simple "no," the government would have to prove that the submissions were actually inflated. But because Clay responded "no, not to my knowledge," Clay may be convicted *even though he was telling the truth* when he said that the submissions were not inflated. That cannot be correct.

Finally, even if Clay's statements *could* be characterized as misrepresenting Clay's beliefs, they *still* would not violate Section 1001 without proof that WellCare's CY2005 expenditure reports were over-reported and the February 2007 encounter data submissions were inflated. As the Supreme Court has recently reaffirmed, the civil securities laws are not violated by a statement of opinion uttered by a corporate director who "think[s] he was lying while actually . . . telling the truth about the matter addressed in his opinion." *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 135 S. Ct. 1318, 1326 n.2 (2015); see also *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1095-96 (1991). It would be entirely backwards to impose *criminal* liability for such statements, as the government proposes here. Indeed, the government's contention that Clay may be convicted for telling the truth would demolish any claim that his statements were material. It could not possibly have *hindered* the government's investigation to tell the agents—truthfully—that the Plans' submissions were accurate.

The government also contends Clay has "abandoned any literal-truth argument on appeal, choosing instead to hitch his wagon to *Whiteside*." Gov't Br. 92 n.27. That contention is mystifying, since the very holding of *Whiteside* is that "the *actus reus* of [a false statement] offense" is "*actual falsity as a matter of law*." 285 F.3d at 1353 (emphasis added). Far from relieving the government of its duty to show actual falsity, *Whiteside* reaffirms it, requiring the government to prove

that Clay's statement was "not true under a reasonable interpretation of the law" (*id.* at 1351)—in this case, the rules pertaining to 80/20 submissions and encounter data submissions. That is *exactly* what we argued the government failed to do (at 20-29).[1]

B. Apart from its efforts to avoid its burden altogether, the government has little to say about why either of Clay's charged statements was objectively false. On Count 10, the government does not dispute that, if it was permissible for the Plans to include the Harmony subcapitation in their CY2006 expenditure calculation, then it was also permissible to include the Harmony subcapitation in the Plans' CY2005 expenditure calculation (the basis of Count 10). And the government does not dispute our showing (Clay Br. 20-21), that if the inclusion of the Harmony subcapitation was permissible, there was no proof that the CY2005

[1] Once again attempting to avoid its burden of proving falsity, the government contends in a footnote that Clay cannot adopt the *Whiteside* argument made in the Behrens brief because it is a sufficiency argument. What Clay adopted, however, was the purely *legal* discussion of *Whiteside* as it relates to the validity of the Harmony subcapitation. We then explained why, if that legal premise is accepted—*i.e.*, if the use of the Harmony subcapitation was permissible under a reasonable interpretation of the applicable legal rules—it should result in an acquittal as to Clay. This Court's June 26, 2014 Order regarding the opening briefs did not require the defendants in this case to rehearse the same *legal* arguments in four separate briefs. To the contrary, the cases cited in this Court's order make clear that, when a "sufficiency argument turns on facts common to all appellants and the legal import of those facts, [this Court will] consider this claim as to every appellant who either raised the argument or opted into co-appellants' arguments." *United States v. Khoury*, 901 F.2d 948, 964 n.14 (11th Cir. 1990) (cited in this Court's June 26, 2014 Order at 2).

submissions exceeded the amounts that the Plans were legally obligated to report. Thus, for the reasons stated in Behrens's Reply in connection with the CY2006 submissions, the government failed to show that the CY2005 submissions were "over-reported."

As to Count 11, the government's *sole* argument is that Clay could be convicted if he *believed* that the encounter submissions were inflated—even if they were not. Gov't Br. 92-93. Thus, the Court will not find a single sentence in the government's brief explaining how encounter data were supposed to be priced, or why the methodology applied by WellCare in the February 2007 encounter submission somehow "inflated" the data within the meaning of the Encounter Template, which required the Plans to report the "costs associated with the claim." And for good reason: As we explained in our opening brief (at 22-29), there is no proof that the Plans' encounter pricing was in fact "inflated" under any governing rule. To the contrary, the government's own witnesses testified that there was no rule precluding WellCare's approach—and that it was perfectly reasonable for the company to price encounters the way that it did. See Clay Br. 25-27. The government has effectively conceded the issue of objective falsity on Count 11.[2]

[2] The government does cite one piece of the abundant evidence confirming that the February 2007 encounter submission was not "inflated." The government says that, at the January 16, 2007, meeting, WellCare employee (and former AHCA official) Robert Butler "suggested that WellCare price its behavioral health encounters at what Harmony was paying for them . . . not what WellCare was

II. THIS COURT SHOULD DECLINE THE GOVERNMENT'S INVITATION TO READ WILLFULNESS AND MATERIALITY OUT OF SECTION 1001

Our opening brief showed (at 30-41) that the government offered no evidence proving Section 1001's elements of willfulness and materiality on Counts 10 and 11. On appeal, the government cites no evidence that either element was satisfied. Instead, it offers arguments that, if credited, would read the willfulness and materiality elements out of Section 1001 entirely.

A. The government does not dispute that, to prove willfulness, it had to prove that Clay acted not merely deliberately, but also with knowledge that his conduct violated the law. See Gov't Br. 104 & n.31; see also Clay Br. 30-32. Yet the government fails to identify any evidence supporting that conclusion.

---

paying Harmony." Gov't Br. 42-43. Not so. What Butler actually said was that he had "cleared with the state" a "pricing methodology" that would base the Plans' encounter prices on the subcapitations that they had paid to Harmony. A531 (57:6-7). Indeed, shortly before the meeting Butler had sent his colleagues an email recounting a conversation he had with AHCA official Ralph Quinn, who had specifically "recommend[ed] (not just condone[d]) unbundling our payments and determining/allocating to the encounters submitted based upon the actual costs to us." A699 (GX-0853). The government suggests that this email concerned only "capitated payments from Harmony to providers, not capitated payments from Staywell and Healthease to Harmony." Gov't Br. 88. But the government ignores the portion of the email (quoted at page 12 of our opening brief) that specifically states that Quinn "recommended pricing our encounters from Harmony with this same methodology." A699 (GX-0853). Butler's email acknowledged that this recommendation involved a related-party transaction, making clear that he was referring to the subcapitation paid by the Plans to Harmony (a related party) rather than any further subcapitations paid by Harmony to downstream direct providers (who were *not* related parties).

Instead, the government insists (at 105) that, because Clay understood that he was interacting with federal agents, "[c]ommon sense alone dictates" that he knew that lying would be a criminal offense. But, as our opening brief explained (at 34-36), while Section 1001's expansive scope may seem axiomatic to lawyers and judges well-versed in the federal criminal code, it is *not* a matter of common sense for a layman like Clay. That is particularly true with respect to Section 1001's application to unsworn, informal interviews. Such interviews "do not sufficiently alert the person interviewed to the danger that false statements may lead to a felony conviction." *Brogan v. United States*, 522 U.S. 398, 410-11 (1998) (Ginsburg, J., concurring in the judgment). Moreover, the Model Penal Code and the criminal codes of at least 12 States do not generally criminalize false oral statements made during unsworn interviews with law enforcement agents. See Clay Br. 35-36. The government does not even mention that fact, let alone explain how it can be squared with a presumption that everyone must know that it is a crime to make a false statement during an informal interview with a federal agent.[3]

[3] The government's reliance on *United States v. Rodgers*, 466 U.S. 475 (1984), is misplaced. In *Rodgers*, the Supreme Court held that false statements made during informal interviews with the FBI satisfy the jurisdictional nexus under Section 1001. See 466 U.S. at 479-84. We do not dispute that false statements made during informal interviews with federal agents are criminalized by Section 1001. Our point, not undermined by *Rodgers*, is that this criminal prohibition is not so obvious that a defendant may be presumed to know of it without case-specific evidence. On that score, the more relevant authority is the line of (admittedly superseded) pre-*Rodgers* decisions, discussed in our opening brief (at 34 n.12), that

The government suggests (at 105) that Clay's knowledge of unlawfulness can be inferred because, it says, his statements to the agents were intended to conceal underlying wrongdoing with respect to WellCare's 80/20 submissions. But the government has conflated two distinct issues: Clay stands convicted, not of any underlying wrongdoing, but of making false statements to the investigating agents. Even if the government were correct that Clay made statements to conceal wrongdoing with respect to WellCare's underlying submissions—and it is not—that would at most tend to show knowledge of *that* wrongdoing. It is irrelevant to the willfulness question posed by Clay's Section 1001 counts: whether he understood that making false representations to the investigating agents itself would be a criminal offense. For that reason, the government's analogy to *Bryan v. United States*, 524 U.S. 184 (1998), is misplaced. In that case, the Supreme Court observed that the defendant's acts to conceal his underlying criminal activity tended to prove knowledge that the *underlying conduct* was unlawful. See *id.* at 189 n.8. That is not the charge on which Clay was convicted.

The government has no real response to our argument that the record contains *none* of the indicia courts have relied upon to uphold jury findings that a

---

refused to apply Section 1001 to unsworn interviews with federal law-enforcement agents. If the illegality of false statements made in this context were dictated by "common sense alone," as the government contends, then surely those courts would not have found it *unthinkable* that Congress intended to criminalize lies during unsworn interviews.

defendant understood that making a false statement would be a crime. It is undisputed that Clay received no warning that lying to the agents would be a crime (unlike the defendant in *United States v. Brandt*, 546 F.3d 912 (7th Cir. 2008)), and that he signed no certification acknowledging that false answers would be unlawful (unlike *United States v. Awad*, 551 F.3d 930 (9th Cir. 2009)).[4] And although the government relies on Clay's "credentials" as an "executive operating a company dependent on public funds" (Gov't Br. 106), there is no logical connection between Clay's position at WellCare and knowledge that making false statements during an unsworn interview would be a crime. That stands in marked contrast to the case the government invokes, *United States v. Moyer*, 674 F.3d 192 (3d Cir. 2012), where the defendant's training *as a certified law enforcement officer* was held sufficient to prove his knowledge that lying to a federal agent is unlawful. *Id.* at 214.

[4] The government contends (at 105-06) that *Brandt* is inapt because it supposedly applied the heightened willfulness standard established in *Ratzlaf v. United States*, 510 U.S. 135 (1994), which requires evidence that the defendant knew of the specific legal prohibition his conduct violated. That is wrong. In *Brandt*, the court found it unnecessary to decide whether Section 1001's willfulness element requires proof only of simple deliberateness or, in addition, that the defendant knew that his conduct was unlawful, because it concluded that the evidence was sufficient "under even this more demanding interpretation." 546 F.3d at 916. Thus, when the court spoke of a "more demanding interpretation," it was applying precisely the same standard for willfulness that the government concedes governs here, not the even heavier burden adopted in *Ratzlaf*. And in affirming the defendant's conviction under that standard, the Seventh Circuit relied on a piece of proof that is conspicuously absent here—a specific warning that lying to the agents would be a crime.

We do not contend that the government had to rely on the same types of evidence that other courts have previously found sufficient to demonstrate knowledge of unlawfulness. But these cases establish that, to prove willfulness, the government must introduce *actual evidence*—not unsupported speculation or post hoc invocations of "common sense"—showing that the defendant understood that making a false statement would be a crime. This Court should reject the government's request for a groundbreaking departure from that principle.

B. The government also has no persuasive response to our argument that its proof of materiality was insufficient—*i.e.*, that it failed to show that Clay's answers had "a natural tendency to influence, or [were] capable of affecting or influencing, a governmental function." *United States v. Diaz*, 690 F.2d 1352, 1357 (11th Cir. 1982) (internal quotation marks omitted). Rather than engaging our arguments, the government tilts at a series of straw men. Gov't Br. 108-09. We do not dispute that *potential* reliance may suffice. Nor do we claim that a statement is immaterial merely because the government knew it was false.

Our argument rests on the narrower proposition that materiality must be analyzed in context, not by plucking out a handful of Clay's words from the broader interview. See *Weinstock v. United States*, 231 F.2d 699, 702 (D.C. Cir. 1956). That context negates the government's contention that Clay's statements were capable of undermining the agents' investigation. Clay disclosed that, in

WellCare's view, "Harmony's charge to Staywell and HealthEase at 80 percent or higher under a fixed price contract is enough to meet the 80 percent rule on the 80/20 report." A752 (80:18-21). That was the core of the alleged fraud charged by the government in this case, and Clay freely volunteered it. And Clay openly related his understanding that "there ha[d] been an ongoing debate between WellCare and AHCA over the definition of an allowable expense." A752 (83:11-13).

Proving materiality beyond a reasonable doubt requires "a factual evidentiary showing." *United States v. Beer*, 518 F.2d 168, 172 (5th Cir. 1975). Speculation does not suffice. Thus, in light of the significant disclosures that accompanied the statements charged in Counts 10 and 11—disclosures of the core facts upon which the government would build its prosecution—the government had to offer *proof* that Clay's alleged misstatements could have influenced the agents' investigation. But the government cites nothing in support of its claim (at 109) that "Clay potentially distracted and derailed the investigation."

III. AT A MINIMUM, A NEW TRIAL IS WARRANTED ON BOTH COUNTS OF CONVICTION

Our opening brief showed (at 41-42) that the government's use of WellCare's financial restatement warrants a new trial for Clay on Count 10. As Behrens's Reply explains (at 30-44), the government has done nothing to undermine this showing of prejudicial error.

Our opening brief also explained (at 43-45) that the district court's instruction on the *Whiteside* defense prejudiced Clay's defense on Count 11 by directing the jury to the wrong source of law. Count 11 charged that Clay made a false statement regarding WellCare's *encounter-data submissions*, which were governed by the Encounter Template that WellCare received from AHCA. But the district court's instruction directed the jury to determine whether Clay's statement was false under a reasonable interpretation of the *80/20 templates* (which have *nothing* to do with encounters).

The government does not (and cannot) defend that erroneous instruction. Rather, it argues that that erroneous instruction is irrelevant. First, the government contends that "Clay's argument is misplaced because the relevant question was the agents', not either template's." Gov't Br. 93. As explained above, that argument misses the point: By asking Clay whether WellCare had "inflated" its encounter data, the agents necessarily incorporated the rules governing encounter data—specifically, the Encounter Template. See pp. 3-5, *supra*. To prove Clay's answer false, the government therefore had to show that the encounter data were in fact "inflated" under any reasonable construction of the Encounter Template—not, as the district court mistakenly instructed, the 80/20 Templates (which pertained only to the 80/20 submissions).

Second, the government asks this Court to disregard the district court's error on the ground that Clay "never asked the district court to instruct the jury regarding encounter templates." Gov't Br. 93. That is false. As we explained in our opening brief (at 44 n.15), Defendants had requested a broader instruction that would have encompassed the requirements for encounter data. See A657-1 at 37 (requiring proof of falsity under any reasonable interpretation "of the governing legal requirements"). The district court denied that request, and declared that the *Whiteside* instruction would instead refer to the 80/20 "template." A664 (105:8).

Clay immediately objected. "Count 11 was encounters," his counsel explained, and "encounters . . . didn't use that template." A664 (108:16-19). Clay offered to provide a substitute instruction that referred to a source of law that, unlike the 80/20 template, actually governed encounter submissions. *Id.* at 108:20-22. The court denied that request. *Id.* at 108:23.

Yet the government now asserts that Clay waived that objection—without even citing the portion of the charge conference where Clay's counsel made the specific objection set forth above. See Gov't Br. 93 (citing A664 (104-107)). The government turns a blind eye to Clay's contemporaneous objection only because there is no conceivable argument—the government certainly makes none—that the district court's instruction was anything but prejudicial error. This Court should

therefore order a new trial on Count 11 (if it doesn't overturn Clay's conviction on Count 11 outright).

CONCLUSION

The judgment of conviction should be reversed.

Respectfully submitted.

/s/ Lawrence S. Robbins

WILLIAM F. JUNG
PAUL M. SISCO
JUNG & SISCO, P.A.
101 E. Kennedy Blvd., Suite 3920
Tampa, FL 33602
(813) 225-1988

LAWRENCE S. ROBBINS
MARK T. STANCIL
DONALD BURKE
DANIEL N. LERMAN
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street NW, Suite 411-L
Washington, DC 20006
(202) 775-4500
lrobbins@robbinsrussell.com

April 17, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Appellate Rule 32(a)(7)(B)(i) and this Court's order dated February 10, 2015.

1. Exclusive of the exempted portions of the brief, as provided in Appellate Rule 32(a)(7)(B) and Eleventh Circuit Rule 32-4, the brief contains 4,549 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Appellate Rule 32(a)(7)(B), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Lawrence S. Robbins
LAWRENCE S. ROBBINS
April 17, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

I further certify that today, April 17, 2015, I caused seven paper copies of the foregoing to be dispatched to the Clerk by FedEx for delivery within three days.

/s/ Lawrence S. Robbins
LAWRENCE S. ROBBINS